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CONFLICT OF LAWS UPON THE SUBJECT OF MARRIAGE AND DIVORCE.

The basis of modern civilization is the home, and yet in no field of the law is there more diversity in the various jurisdictions, than is to be found on the subject of marriage and divorce. This divergence of view is a source of so much evil that wide spread attention is drawn to it, and various plans proposed for its removal.

The question may first be considered from the standpoint of marriage in cases where there has been no previous divorce, and thus no added complication.

As a broad general proposition, it may be said that a marriage valid where made is valid everywhere, and if not valid in the place of inception, it is valid nowhere. Were this the sole test, there would be little trouble on this head. But this simple rule is varied by circumstance, and troublesome questions arise. Should nationality or citizenship of the parties play any part; and what is the effect of public policy? Thus suppose a country where dual marriages are legal, and a citizen of such country marries two wives there. These two marriages are lawful where made. Suppose such person travels to England with both wives, or with the second wife? The English courts would certainly not recognize such second marriage or give any effect to it, because such recognition would be against the moral sense of the community. In this case, the parties are all foreigners. But suppose an Englishman goes to such foreign country, settles and marries again, living there happily with both wives. In the event of his death, can the second wife claim dower in the husband's English real estate? It would seem

not, and yet why should England concern herself with what takes place in a foreign jurisdiction, and why does the fact that an Englishman has taken unto himself these two wives, one in the foreign country, affect the question? Is the theory sound that a country can order and control the actions of its people out of the jurisdiction of such country? Possibly the safety of a country may demand that such a purely personal law shall follow the citizen everywhere as regards political duties, but what sound reason is there for extending such an anomolous doctrine further? But suppose again that a citizen of such foreign country dies leaving children by such second marriage, both wives living at his death, can such children be treated as legitimate by the English Court if the question comes before them? As they are legitimate in their home country, it would seem probable that the English courts would so recognize them, but what difference would it make if the father were an Englishman? It ought not to change the result, as the children of the second wife are legitimate in their home country, but it is quite doubtful what the English Courts would say in that case, and still more doubtful if both the wives were English women.

In 1853 a French man and woman were living in Paris. In 1854, the parties went to London and were there married in due form. The woman was then twenty-two, and the man twenty-nine, and the consent of the man's father was not obtained. By the French law, if the woman is under twenty-five or the man under thirty, the parents' consent must be obtained or certain formalities taken in France *in lieu* of such consent. This was not done. In 1854, the woman began an action in France for the annulment of the marriage on the ground of its nullity, and the French court so decreed. In 1860, the woman, having taken up a residence in England, petitioned the Court for a decree of nullity of marriage. The petition was dismissed.[1] This unfortunate woman was thus married in England, but single in France. On sound principle, it would seem that the English court was correct, and the French rule wrong, for how can the French court properly follow its citizens into England, and say what they shall or shall not do there. As they were properly married in England, ought not the French Court to recognize the validity of such marriage, precisely as they would have done, had the couple been English.

The English House of Lords, however, in the well known case

1. *Simouin v. Mallac*, 2 Sev. and Tr. 67.

of *Brook v. Brook* [2] looked at the question very differently, when Englishmen were concerned. In that case in 1850, an Englishman was duly, according to the laws of Denmark, married in Denmark to an English woman, who was the lawful sister of the man's deceased wife. Both were lawfully domiciled in England at the time, and had merely gone to Denmark temporarily. The court held this marriage void, and held that such marriages were prohibited to all English domiciled persons wherever they might go. It was contended that if such marriages were to be held contrary to the laws of God, then such a marriage between two Danes, celebrated in Denmark, must be contrary to the laws of God, and that, therefore, if the parties to it were to go to England, they must be considered as living in incestuous intercourse, and any issue as illegitimate.

To this the Court said: "But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our law which makes the marriage void and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction." This does away with the idea that refusal to recognize the marriage is based upon the ground of morality. If such a marriage is immoral for English people, it must be equally so for Danes.

The reasoning of the case is not convincing, and one more ground for confusion is added to those already existing. Suppose an Englishman marries an American girl and she dies. He marries her sister in New York. That is clearly a lawful marriage where celebrated. What would the English court say? In *Broke v. Broke,* we have a couple lawfully married in Denmark, but unmarried in England. Should each remarry in England, such remarriages would be valid there, but, doubtless, void in Denmark, and probably the second marriages would be treated as bigamy in Denmark. This seems a preposterous result, but necessarily follows from the doctrine of a personal law which can stretch out beyond the jurisdiction all over the world. The results are not more preposterous than the theory.

In the United States, the courts generally sustain a marriage which is valid where made, if no question of previous divorce is involved, and in this respect, at least, has more uniformity than exists elsewhere, and a simpler and more satisfactory rule.

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2. 9 House of Lords Cases, 193.

Turning now to the question of divorce, still greater confusion arises from the divergent views of different jurisdictions.

And first we have the rule adopted by some courts that citizenship governs the question of divorce. According to this view, the citizens of a given country are governed by its laws as to the status of marriage, and can only dissolve such marriage by the laws of their domicile, even though both spouses are in a foreign jurisdiction, and the divorce is according to its laws.

Again we find the rule that if one of the spouses takes up a residence in any jurisdiction, a divorce may be obtained by such spouse, although the other has never been within the jurisdiction and there is only substituted service by publication.

It seems to be generally recognized that if neither of the parties has an actual *bona fide* residence within a given territory, there is no jurisdiction to declare the parties divorced.

Some illustrations will indicate the situations which may arise in different cases.

A Rhode Island woman, while at school, married an Englishman. Subsequently the husband deserted her in Boston, and went to Europe. The wife returned to her father's home in Rhode Island, and after three or four years, not having heard from her husband, and knowing nothing as to his whereabouts, brought an action for divorce in the Rhode Island Courts. The husband was served by publication only, and the divorce was granted. [3] A very similar case arose in France, and the French Court granted a divorce to the wife, a Frenchwoman, although the husband, a German, was not within the jurisdiction, and his whereabouts unknown. [4]

These cases seem reasonable, and would strike one as just. But suppose the case of a woman married and living in Connecticut. Her husband is a mercantile traveller, and often absent for months at a time. He leaves his wife on one of these trips, and she supposes they are still happily married. He takes up a three-months residence in some far western state, obtains a divorce by publication, and the wife, having no idea of any domestic trouble, suddenly learns that she is divorced. Such cases have occurred.

But some states have refused to recognize such divorces, and have held that the papers in the proceeding must be actually delivered to the absent spouse, and that constructive notice is not

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3. *Ditson v. Ditson*, 4 R. I. 87.

4. *Wilhelm v. Wilhelm*, 23 Clunet, 149.

sufficient. The result is that the divorce is valid in some states, and not in others. A man may have one legitimate wife in one state, and another equally legitimate in another. This second marriage is bigamy in one state, and lawful in another.

The crowning result is reached in the very recent United States Supreme Court decision in the case of *Haddock v. Haddock*. In this case, the couple were married in New York in 1868. The husband at once left his wife, and took up residence in Connecticut, where in 1881 he procured a divorce by publication, and in 1882, married another woman. In a proceeding brought by the first wife in New York, the New York Court held that the Connecticut divorce was void for want of jurisdiction and that the New York woman was still the legal wife. The case was taken to the United States Supreme Court on the constitutional ground that the New York Court had failed to give full faith and credit to the Connecticut judgment. The Supreme Court sustained the New York decision, on the ground that the Connecticut Court had no jurisdiction.

The result is singular. The Supreme Court determines solely that the New York Court had not acted unconstitutionally. It does not, of course, vacate the Connecticut divorce and second marriage. Thus the Connecticut man has a lawful wife in New York, as declared by both the New York and Federal Courts, while in Connecticut she is not his lawful wife, but another woman is. If the Connecticut pair come to New York, he is committing adultery, and he appears to have committed bigamy, while if the New York lawful wife should live with her husband in Connecticut, he would be committing adultery.

It will not illuminate the matter to take up further decisions, or to discuss the varying views of the different states or of foreign nations.

The people of this country are fully awake to the danger of the situation, and much thought is being given to the question. The difficulties in the way are great. Were a Federal statute possible, that would simplify the matter. But the Constitution gives no warrant for such legislation, and there seems small hope of a constitutional amendment, although it is barely possible that public discussion might arouse a sufficient sentiment to accomplish this. On other grounds it may even be doubted whether such amendment is desirable. Many believe that the Federal Government is taking too many state matters unto itself, as it is. There may be hope of bringing about a uniformity of legislation in each state, but

this is a tremendous undertaking, and when accomplished, the chances are strong that judicial interpretation would soon bring about divergence again, so that the remedy would not avail much. This result seems to be gradually coming about in respect to the recent attempt to unify by codification the Negotiable Instrument Law, and the probabilities are much stronger that a divergence would be brought about in the case of marriage and divorce laws.

Although the divergent views in foreign courts cause much evil, yet there is not the crying need for change which exists in the United States, because we have in one country numerous jurisdictions, and the intercourse between the people of one country is necessarily greater than between the people of foreign countries. To some extent, the same difficulty exists in Great Britain, where they have three distinct jurisdictions, viz., England, Ireland and Scotland, with great difference of views and decisions, but these three jurisdictions are nothing, compared with the courts of all our states, territories and intermingled with them, all those of our Federal system.

The effort of those seriously studying the matter among us is, therefore, very wisely confined to the attainment of some uniformity in the United States.

The people of each state naturally prefer their own system. They have grown up under their own laws and these have become a part of their make-up and character. This is especially the case in many of the older states, where there is less change of domicile on the part of the influential portion of the population.

As marriage is a status affecting the very foundations of society, necessarily it follows that a state will be tenacious of its views, and will very likely insist that its citizens must conform to its ideas on this subject, whether they act in its jurisdiction, or within the territorial boundaries of some other state. It is hard for any people to give up this feeling, and yet it seems that many difficulties might be avoided, if this notion that citizenship or residence must play some part should be abandoned. Already, it is very generally recognized that a marriage celebrated in any state according to the laws of that state, shall be valid anywhere in the United States, without reference to the residence or citizenship of the parties. Why should not the same rule prevail as to divorces? Let each state decide for itself, what shall be requisite for divorce within its borders, and let the universal requisite be that both parties shall be within the jurisdiction and served there, or the di-

vorce shall not be granted. The fact that both parties are citizens of a state should not give jurisdiction, unless both are within the territorial jurisdiction at the time, and on the other hand, if the parties are both within any state territorial jurisdiction, that ought to be enough without any reference to citizenship or residence. Let each state determine for itself whether any or what residence should be necessary and also upon what grounds divorce shall be granted. If any state becomes too lax in its views, then the weight of general public opinion can be focussed upon such state, and reform induced in that way.

Of course this leaves many troublesome cases without relief. Thus in the above case of *Ditson v. Ditson,* the deserted wife would have no method of freeing herself. Again any unfaithful spouse could prevent the penalty of divorce, by simply keeping out of the state in which the other might be.

All these unfortunates, however, would in that case have to endure their marriage bonds for the general good of the community. If the courts of this country would act upon this simple law of jurisdiction over the person, through bodily presence in the state, there would be no need for any legislation whatever. It may well be said that it will be as difficult to bring about any such uniformity of views, as to accomplish any of the other suggested plans. It may be so, but again, such a result might be brought about more easily than is supposed, and such a decision by the United States Supreme Court, as the recent case of *Haddock v. Haddock,* has great influence and may help immensely in accomplishing good results.

The limits of a magazine article preclude anything more than a cursory glance at this great subject, nor is it possible to say anything that has not already been stated in one form or another, but when the Supreme Court calls sharp attention to the subject, it may do us good again to review a few of the points involved.

Our home life, our civilization, the safety of our government demands some settlement of these intolerable evils.

Clarence D. Ashley.